Supreme Court, U.S.
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No. 02-1333

In the

Supreme Court of the United States

GEFFREY WAXMAN and GAIL WAXMAN, as Parent and Natural Guardian of Richard Waxman, a Minor, and RICHARD WAXMAN,

Petitioners,

v.

ROSLYN UNION FREE SCHOOL DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

Stanley A. Camhi
Counsel of Record
Carol M. Hoffman
Scott B. Fisher
Carol A. Melnick
JASPAN SCHLESINGER HOFFMAN LLP
300 Garden City Plaza
Garden City, NY 11530
(516) 746-8000
Attorneys for Respondent

CURRY & TAYLOR ♦ (202) 393-4141 ♦ HTTP://USSCINFO.COM

QUESTION PRESENTED

WHETHER A COURT'S TEMPORARY REMOVAL OF A STUDENT WITH A SUSPECTED DISABILITY FROM HIS THEN CURRENT SCHOOL PLACEMENT, AFTER FINDING THAT MAINTAINING THE STUDENT IN THAT PLACEMENT IS SUBSTANTIALLY LIKELY TO RESULT IN INJURY TO HIMSELF OR OTHERS, IS CONSISTENT WITH THIS COURT'S HOLDING IN *HONIG v. DOE*.

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JURISDICTION

This Court lacks jurisdiction to entertain this matter. 28 U.S.C. §1257 provides in relevant part that this Court may review by writ of certiorari "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." The instant petition seeks review of an interlocutory order.

STATUTORY PROVISION

Individuals with Disabilities Education Act, 20 U.S.C. §1415(j)

> **Maintenance of current educational placement.** Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

COUNTER-STATEMENT OF THE CASE

On November 21, 2000, respondent, the Roslyn Union Free School District ("District"), commenced an action in the New York State Supreme Court, for an order enjoining Richard Waxman's continued attendance at the

District's Middle School due to certain exhibited behaviors which raised safety concerns for both Richard and others at the school. Although Richard's parents had refused to allow the District to evaluate him, the District had reason to believe that Richard was a youngster with a disability within the meaning of the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 *et. seq.* As a result, it was required to obtain a court order to remove Richard from the classroom and place him on homebound instruction. The court conducted an evidentiary hearing with respect to the District's motion for a preliminary injunction. On January 8, 2001, the trial court granted the motion finding that Richard's continued placement in the classroom was substantially likely to result in injury to himself or to others.

Factual Background

At the time of the preliminary injunction hearing in January 2001, Richard was ten years old. Richard moved into the District in the Fall of the 1999-2000 school year and enrolled in the fifth grade at the District's East Hills Elementary School. According to school personnel, Richard started exhibiting behavioral problems shortly after he arrived in the District. Some of the behaviors included threatening to kill staff, refusing to comply with school rules and staff instructions, poking at his eyes with pencils, putting plastic wrap in his mouth, sliding off his chair onto the floor, screaming out, speaking incessantly, and mimicking staff. As a result of his behavioral problems, on March 15, 2000, the principal of the elementary school referred Richard to the District's Committee on Special Education ("CSE") for a determination as to whether he had a disability and should be classified as such. Classification would have entitled Richard to a special education program and related

services. Richard's parents objected to the referral. The CSE convened on May 23, 2000. It determined that in view of Richard's maladjustment to school and his disruptive and aggressive behavior, a psychiatric and psychological evaluation was necessary to evaluate whether Richard had a disability which was adversely affecting his education and his ability to function appropriately in a regular education setting. His parents refused to participate in the CSE process and refused to grant permission for the District to conduct the necessary evaluations.

New York State Education Department regulations provide in relevant part that in the event parents refuse to grant consent to an initial evaluation, the board of education of the school district shall initiate a formal impartial hearing to determine whether an evaluation should be conducted without parental consent. *See*, 8 N.Y.C.R.R. §200.5(b)(1)(i)(c). Due to the serious nature of Richard's behaviors, the District initiated the impartial hearing. The hearing commenced on August 1, 2000 and continued into the 2000-2001 school year. While the hearing was ongoing, Richard continued to attend regular classes in the District. In September 2000, Richard entered the sixth grade at the District's Middle School.

Virtually from the day Richard began attending the Middle School, he engaged in inappropriate behaviors which required intervention by District staff almost on a daily basis. Some of his behavior was quite bizarre. For example, he would call out or laugh for no apparent reason. He would throw paper and eat paper in class. He would curse at teachers and students. He would chant and hum in class. He would mock and mimic teachers. He would refuse to sit down in class. He would make spit bubbles, stick out his tongue, and hide under his desk. On one occasion he got down on the floor and started

motioning as if he was swimming.

During October and November 2000, Richard's behavior problems escalated and he exhibited behaviors which were more and more dangerous to himself, to other students and to the school's administrators, faculty and staff. For example, several times Richard chased other students. He spit at students, threw "spit balls", and spit milk at them. On one occasion Richard spit in another student's ear. He attempted to trip students with his book bag. He threw things at other students. Once he threw his book bag at a teacher. Another time he threw a pen cap at a student. He hit students on their heads with a folder. Once he tried to hit a student with a pencil case. Another time he tried to jab a student with a pencil.

His inappropriate and dangerous behavior was also directed at teachers and support staff. On one occasion, Richard barred his teacher from entering the classroom by barricading the door while he and other students were inside. On other occasions he pushed teachers and once grabbed the hand of a teaching assistant and bent back her fingers.

Richard's behavior was also self-destructive and dangerous. On one occasion he started spinning in his seat, fell on the floor, and then started spinning on the floor. Another time he locked and barricaded himself in the school's detention room. He often put wads of paper in his mouth. Once he was seen chewing on a sharp plastic shard. He had to be stopped from banging a ruler on his head. He ignored instructions during a fire drill, running out of the building and almost being hit by a car. Several times Richard left his classroom without permission, sometimes even leaving the building.

On October 27, 2000, Richard was suspended by the principal of the Middle School for two days because of an incident in front of the school building in which Richard was running and swinging around concrete poles. When the principal attempted to get Richard to return to the building, Richard ran into a glass and metal door several times, slamming his body and head against the door. Although the suspension was for two days, Richard did not return to school until November 14, 2000.

On November 15, 2000, an incident occurred which jeopardized Richard's life as well as the safety of District personnel. After lunch, Richard was required to go to his next class. Instead, he returned to the school's cafeteria to use a vending machine. Richard knew that the machine was "off limits" until after school and was told that he would have to wait until then if he wanted something from the machine. He objected and started running around the cafeteria crawling under and around the tables. Finally, he maneuvered himself to the vending machine. When District personnel tried to confiscate the item he had purchased, Richard ran out of the building and into the school yard. He ignored repeated requests to stop and return to the building. Instead, Richard kept running across the field and around the school grounds. Eventually he came to a gate and ran off the school property and onto the adjacent service road of the Long Island Expressway, a major highway, at the same spot where a student had been killed a few years earlier. When the Middle School principal finally caught up with Richard, Richard picked up a rock as if he was going to throw it. When Richard ran onto the service road, the principal grabbed him, pulled him off the road and brought him back into the school to await the arrival of his parents.

As a result of this dangerous behavior, the principal suspended Richard from school for five days. Although Richard's behavior as a non-classified student would have warranted a Superintendent's hearing pursuant to N.Y. Education Law §3214 to determine whether any additional penalty for his conduct should be imposed, special rules apply with respect to the suspension of students who are disabled within the meaning of the IDEA and the State Education Law. With limited exceptions, a school district may not suspend a student with a disability from regular attendance from school in excess of ten days, since such an extended suspension is considered a change in placement which is prohibited by the IDEA. 20 U.S.C. §1415(j). Notwithstanding this "stay put" provision, a school district may apply to a court for injunctive relief to enjoin a dangerous disabled child from attending school in accordance with this Court's holding in *Honig v. Doe*, 484 U.S. 305 (1988).

Because of Richard's serious, repeated, dangerous, and threatening behavior, the District sought an order from the New York State Supreme Court excluding Richard from regular instruction in school pending an evaluation and determination of whether he was a youngster with a disability within the meaning of the IDEA and, if so, the development of an appropriate individualized educational plan ("IEP") in accordance with the IDEA.

The Preliminary Injunction Hearing

The court conducted an evidentiary hearing on January 3, 2001 and January 4, 2001 to ascertain whether there was sufficient evidence that Richard was a danger to himself or to others to warrant the issuance of a preliminary injunction enjoining his attendance at school.

The District produced eight witnesses at the hearing, including four of Richard's teachers, two teaching assistants, the Middle School principal and the Assistant Superintendent for Pupil Services and Personnel. The teachers, teaching assistants and principal all provided eyewitness accounts of Richard's dangerous behavior. Two of his teachers testified that Richard ignored instructions during a fire drill, bolted out of the classroom and out of the building, ran onto the roadway by the entrance to the school and just missed being hit by a car. Another teacher testified how Richard picked masking tape off the floor and ate it. Another testified how Richard locked her out of her classroom and refused to open the door. Another teacher testified that Richard threw a book bag at her. Another teacher testified how Richard chased a student with a pencil in his hand. Another testified how Richard repeatedly banged himself on his head with a plastic bottle. One of the teaching assistants described how he saw Richard repeatedly slam his body against a glass and metal door. Another teaching assistant testified how Richard pried her fingers off a door knob when she tried to open a door that he was blocking. The principal testified how Richard ran out onto the service road of the Long Island Expressway after leading school officials on a chase along the perimeter of school grounds, through woods and across two driveways.

Richard and his parents were represented by counsel at the hearing and had the opportunity to cross-examine the District's witnesses. They also had the opportunity to present witnesses on their own behalf including Richard's psychologist, Dr. Ronald Cohen. He confirmed that Richard had difficulty respecting boundaries and complying with rules in the classroom. In addition, Dr. Cohen testified that, in his opinion, Richard required psychological help and that it would be in his

best interest if an assessment was done. Richard's father testified that if Richard wanted to run away from school, an adult would have a hard time catching him. Richard, himself, testified regarding the events. He admitted that he ran out of the building and around the school grounds and that he picked up a rock, although he denied that he intended to throw the rock and denied that he actually ran onto the road.

Finally, the Assistant Superintendent for Pupil Services and Personnel testified regarding the then current status of the impartial hearing the District had commenced to determine whether an evaluation should be conducted without parental consent. At the time of the preliminary injunction hearing, the Impartial Hearing Officer ("IHO") had not yet rendered a decision in the administrative proceeding. She also testified about the District's attempts to address Richard's behaviors in school as well as the home-based services the District would provide so that Richard could keep up with his studies.

On January 8, 2001, the trial court issued a Decision and Order. It concluded that the District had met its burden and granted a preliminary injunction enjoining Richard's attendance in school "until such time as the referral seeking testing has been denied or until the testing has been completed and reviewed by the CSE."[1]

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[1]On February 2, 2001, after a full evidentiary hearing, the IHO rendered his decision. He found that a sufficient basis existed for Richard to be evaluated by the District without his parents' consent. Richard's parents appealed the IHO's decision to the State Education Department. The State Review Officer ("SRO") agreed with the IHO's decision. Despite the decision, Richard's parents still would not allow him to be evaluated.

Petitioners appealed to the Appellate Division of the New York Supreme Court, Second Department. On April 22, 2002, the Appellate Division, affirmed the trial court's order granting a preliminary injunction finding that the District had "clearly demonstrated that permitting the infant defendant to return to regular classroom instruction is substantially likely to result in injury to himself or to others."

Petitioners' motion for leave to appeal to the New York Court of Appeals was denied.

Despite the decisions and orders of the trial court, the Appellate Division, the IHO and SRO, Richard's parents have not allowed him to be evaluated. Without a proper evaluation the District cannot determine what special services, if any, Richard needs and what the appropriate educational placement is for him consistent with those needs. Instead, they commenced a federal action against the District in the Eastern District of New York alleging, *inter alia*, that Richard's rights under the IDEA have been violated. *Waxman v. Roslyn Union Free School District*, (CV-01-7445) (E.D.N.Y.). That action is pending. Until such time as an IEP can be developed which enables the District to properly address Richard's needs, his continued presence in the regular classroom setting is substantially likely to result in injury to himself and/or to others.[2]

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[2]On November 2, 2002, respondent moved by Order to Show Cause in the New York State Supreme Court for an order directing Richard's parents to submit him for the evaluation authorized by the IHO and affirmed by the SRO. Petitioners opposed the application. Although noting that "at every stage of the judicial and administrative process [Richard's parents] have thwarted the [District's] efforts to comply with its mandate under the [IDEA] and New York Education Law," the Court nevertheless denied the application because of

REASONS FOR DENYING THE WRIT

I. THE ORDER WHICH PETITIONERS SEEK TO REVIEW IS AN INTERLOCUTORY ORDER

The petition seeks a writ of certiorari to the New York Court of Appeals to review a Decision and Order of the Appellate Division of the Supreme Court, Second Department, affirming an order of the trial court, granting a preliminary injunction in favor of respondent. The New York Court of Appeals denied petitioners' motion for leave to appeal to that court. 28 U.S.C. §1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

The decision which petitioners seek to review is not a final judgment or decree. As a result, this Court lacks jurisdiction to review the order by writ of certiorari.

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petitioners' pending action in the federal district court.

II. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S HOLDING IN *HONIG V. DOE*

This case contains no novel issues, nor does it present an important question of federal law which has not already been settled by this Court. Indeed, the state court's decision which petitioners seek to review relies upon and is consistent with this Court's holding in *Honig v. Doe*, 484 U.S. 305 (1988) which established an exception to the "stay put" provisions of the IDEA. Under the IDEA, if a school district has reason to believe that a child is disabled within the meaning of the statute, the child is entitled to all procedural protections afforded by the Act. 20 U.S.C. §1415(k)(8)(A). The IDEA provides that a disabled student is entitled to remain in his then current educational placement while any proceedings under the Act are conducted. 20 U.S.C. §1415(j). This is the so-called "stay-put" provision of the IDEA. Since the District had reason to believe that Richard was a youngster with a disability and had initiated "proceedings" under the IDEA to have him evaluated, the "stay-put" provision of IDEA governed Richard's educational placement.

Although pursuant to the IDEA a school district may not unilaterally remove a disabled student from his then current educational placement while review proceedings are pending, it is not without a remedy in appropriate cases. Upon application from a school district, a court, under certain circumstances, may remove a child from his then current placement despite the "stay put" provision.

This authority was confirmed in *Honig v. Doe*, *supra*. In *Honig*, this Court reviewed the history and purpose of the Education of the Handicapped Act ("EHA")

(the precursor to the IDEA) with regard to suspension or expulsion of students with disabilities and noted that while:

> Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students . . .

Honig, 484 U.S. at 323 (emphasis in original). This Court recognized that, although Congress intended that a school district's unilateral authority to change a student's placement be circumscribed, the statute did not affect the equitable power of a court to change a student's placement when maintaining the child in his then current placement was substantially likely to result in injury either to himself or to others. In this regard the Court stated:

> Nor do we think that § 1415(e)(3) [3] operates to limit the equitable power of district courts such that they cannot, in appropriate cases, temporarily enjoin a dangerous disabled child from attending school. As the EHA's legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by *schools*,

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[3] 20 U.S.C. §1415(e)(3) was renumbered and recodified with minor modifications as 20 U.S.C. §1415(j) by the Individuals with Disabilities Education Act Amendments of 1997.

> not courts, and one of the purposes of § 1415(e)(3), therefore, was "to prevent *school* officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." *Burlington School Committee v. Massachusetts Dept. of Education*, 471 U.S., at 373, 105 S. Ct., at 2004 (emphasis added). The stay-put provision in no way purports to limit or pre-empt the authority conferred on courts by § 1415(e)(2) [4], see *Doe v. Brookline School Committee*, 722 F.2d 910, 917 (CA1 1983); indeed, it says nothing whatever about judicial power.
>
> In short, then, we believe that school officials are entitled to seek injunctive relief under § 1415(e)(2) in appropriate cases. In any such action, § 1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others.

Id., 484 U.S. at 327-28. The "substantially likely to result in injury" test has been routinely applied by courts since the *Honig* decision.

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[4] 20 U.S.C. §1415(e)(2) was renumbered and recodified with minor modifications as 20 U.S.C. §1415(i)(2).

The rule established in *Honig* was the only reasonable interpretation of the statute. It recognizes that the health and safety of the child at issue as well as the health and safety of others in the school must be protected, and establishes a fair and impartial mechanism to make certain that a school district does not remove a disabled child from the school setting simply because the student is unruly or difficult. Petitioners acknowledge the District's right to obtain injunctive relief from a court where a disabled student's then current placement is substantially likely to result in injury either to himself or others.

Petitioners' real complaint is that they disagree with the factual findings made by the trial court. They rely upon snippets of testimony or alleged inconsistencies in an attempt to undermine the court's decision. Their "spin" on the facts, however, is at odds with the overwhelming evidence introduced at the hearing. Petitioners also fail to note that their own psychologist, Dr. Cohen, testified that Richard required "psychological help" and that if there was an assessment done "it would be in the child's best interest." He also conceded that, based on the evidence presented by the District, Richard had placed himself in a "potentially life threatening situation."

Petitioners' disagreement with the trial court's factual findings is not a sufficient reason for granting the petition. *United States v. Johnston*, 268 U.S. 220, 227 (1925) (certiorari is not granted to review evidence and discuss specific facts). The trial judge, of course, was in the best position to assess the evidence and the credibility of the witnesses who testified. The record developed at the hearing supported the court's finding that continuing Richard in his then current placement was substantially likely to result in injury to himself or to others.

None of the lower court cases cited by petitioners in support of their argument that the New York courts misapplied this Court's rule in *Honig* are germane since each case is fact sensitive. The state court, based upon the facts presented, properly granted the temporary injunction pending the completion of testing. There is no doubt that Richard has severe behavioral problems. The District has repeatedly attempted to have him evaluated so that it could develop an appropriate IEP to address those problems. Without an appropriate program in place specifically designed to address and deal with his dangerous behaviors, returning Richard to the classroom would pose substantial risks to himself and to others.

Petitioners' reliance upon *Light v. Parkway C-2 School District*, 41 F.3d 1223 (8th Cir. 1994) is misplaced for several reasons. The child in *Light* had been classified as disabled. Petitioners, here, continue to assert that Richard is *not* disabled and, therefore, not in need of any special services. In addition, *Honig* does not impose an additional burden on a school district to demonstrate its efforts to accommodate the child's disabilities as a condition for relief. Nevertheless, the District did demonstrate its efforts to address Richard's behaviors at the hearing. The Assistant Superintendent for Pupil Services testified that a team consisting of Richard's teachers was brought together to discuss and implement various "behavior strategies" to deal with Richard's behavioral issues, but that the strategies were unsuccessful. The District also commenced the impartial hearing so that it could evaluate Richard, even without his parents' consent, and develop an appropriate IEP for him.

Finally, petitioners make reference to the fact that the Commissioner of Education expunged the two suspensions imposed by the school principal. The

Commissioner's decision in this regard is irrelevant to the issues presented on this petition. It was based on the District's technical non-compliance with a regulation which required Richard's parents to *receive* written notice of the suspension within twenty-four hours. ' The Commissioner did not rule or comment upon the underlying factual matters which formed the basis for the suspensions. Specifically, he did not find that the behaviors exhibited by Richard did not create a danger to himself or to others. Moreover, he did not comment on the court's power to remove Richard from his then current placement or the appropriateness of the court's action.

In sum, there is no substantial question of law which needs to be addressed by this Court. *Honig* clearly affirmed a court's equitable power to grant, in appropriate cases, a temporary injunction enjoining a dangerous child from attending school notwithstanding the IDEA's "stay put" provision. The decision of the state court, issued after a full evidentiary hearing, was fully consistent with rule established in *Honig*.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

Stanley A. Camhi
Counsel of Record
Carol M. Hoffman
Scott B. Fisher
Carol A. Melnick
JASPAN SCHLESINGER HOFFMAN LLP
300 Garden City Plaza
Garden City, New York 11530
(516) 746-8000
Attorneys for Respondent Roslyn Union Free School District

APPENDIX

STATUTORY PROVISIONS AND RULES

20 U.S.C. §1415(k)(8)(A)

In general. A child who has not been determined to be eligible for special education and related services under this part [20 USCS §§1411 et seq.] and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this part [20 USCS §§1411 et seq.] if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

20 U.S.C. §1415(j)

Maintenance of current educational placement. Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

8 N.Y.C.R.R. §200.5(b)(1)(i)(c)

In the event the parent of the student to be evaluated does not grant consent for an initial evaluation, such parent shall be informed by the committee chairperson that, upon request, the parent will be given an opportunity to attend an informal conference with the committee or designated professionals most familiar with the proposed evaluation, the person who referred the student for such an evaluation, and counsel or an advisor of the parent's choice, at which time the parent shall be afforded an opportunity to ask questions regarding the proposed evaluation. If at this meeting the parent and the person initiating the referral agree in writing that the referral is not warranted, the referral shall be withdrawn. Except in the case of a preschool child, if the parent does not request or attend such a conference, or continues to withhold consent for evaluation otherwise required for a period of 30 days after the date of receipt of a referral, the board of education shall initiate an impartial hearing to be conducted in accordance with subdivision (i) of this section for the purpose of determining whether such an evaluation shall be conducted without parental consent.